

TRUST LAW

How to break the deadlock between warring trustees

By Anthony Grant

I suspect the biggest category of trust litigation at present involves trusts where former spouses are co-trustees. Their relationship's over and so is the prospect of any co-operation between them.

Today's article involves one of these trusts – *Lockhart Trustee Services v Ryan & Another* [2020] NZHC 1823, 27 July 2020.

In this case, a man and a woman settled a trust for themselves and their children. It owned the family home, jewellery and other chattels. The trust had three trustees, the man, the woman and a corporate trustee formed by a lawyer. In this article I will call the corporate trustee 'the lawyer'.

The relationship between the man and the woman fell apart in a spectacular way: they were involved in no less than nine separate sets of proceedings against each other.

They couldn't agree on the payment of the mortgage which went unpaid and the bank had issued a Property Law Act notice. Penalty interest was accruing on the mortgage.

It was said that some of the family chattels had gone missing.

The lawyer was caught up in the middle of all this. Edwards J said that he was "in an impossible position. [He] is unable to obtain instructions or agreement from [his] fellow trustees..." They distrusted him "and each have made allegations that [he] is acting for the other". He had "been told [he] is acting in breach of [his] fiduciary duties, acting unfairly as between [the parties] and [he] has been threatened with legal action".

The lawyer applied to the court for an order that he should be discharged as a trustee and for an order that a replacement trustee be appointed. Alternatively, he asked for a receiver to be appointed.



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The logical replacement trustee for such a trust, in Auckland at least, is usually the Public Trust or Perpetual Guardian. But in my experience neither of these trustee corporations is keen to accept a trusteeship when the other trustees are at war with each other. That was the case here. Neither was willing to accept appointment.

But there was a more fundamental problem. I assume there were no liquid assets to pay a trustee.

So, the court was faced with a corporate trustee who was desperate to retire, two trustees who were at war with each other and a house on which the mortgage was not being paid and on which penalty interest was accruing. No one was willing to accept appointment as a trustee and there was no cash to pay a replacement trustee, even if one could be found.

The court in its supervisory jurisdiction over trusts must find a solution to this type of problem and there was a person who was willing to be a receiver.

Edwards J said: "The appointment [of a receiver] is a matter of last resort where there is no other adequate legal or equitable remedy available or when the court is satisfied that the existing law

and contractual arrangements are such that no other means of achieving the desired object can be obtained." [34]

Although the trust deed allowed the trust to function with two trustees, there was no point in releasing the lawyer and leaving the warring spouses since they couldn't agree on anything. The judge said that "the level of acrimony and dysfunction is such that there is really no other option but to remove all trustees".

The receiver was given the powers and authority set out in s 14(2) of the Receiverships Act 1993 and was instructed to report to the court within four weeks of his appointment on the condition of the trust assets. His costs were to be met from the assets of the trust.

The lawyer has sought an order that his costs should be paid from the assets of the trust and this request was to be the subject of argument.

I suspect there are several trusts like this, where the spouses who are co-trustees have fallen out, the trust is dysfunctional and there is no money to pay a person who might be willing to accept appointment as a trustee to fix up the mess.

The *Lockhart* decision points the way to a solution: remove the warring parties and appoint a receiver who is to liaise with the court on how to fix the problems with the trust.

There are also some lessons from this case for lawyers who act as trustees. First, acting through a corporate trustee may relieve you of some difficulties but in the present case it doesn't seem to have been of much benefit.

Second, a Deed of Trust should contain a summary mechanism by which a corporate trustee can resign at will, against the opposition of people in the position of the warring spouses in the *Lockhart* case.

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